

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suede G. Kelly.

Ocean Peaking Power, L.L.C.

Docket No. EL05-142-000

v.

Jersey Central Power and Light Company

ORDER ADDRESSING COMPLAINT AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued October 17, 2005)

1. On August 16, 2005, Ocean Peaking Power, L.L.C. (Ocean Power) filed a complaint with the Commission alleging that Jersey Central Power and Light Company (Jersey Central) was improperly charging it local distribution rates under a state-jurisdictional tariff for deliveries of station power. In this order, the Commission sets for hearing the issue whether Ocean Power is, in fact, using local distribution facilities owned by Jersey Central when it purchases station power and whether Jersey Central has violated the provisions of a rate schedule on file with this Commission (Attachment K of the open access transmission tariff (OATT) of the PJM Interconnection, L.L.C. (PJM), which contains PJM's station power procurement and delivery provisions).¹

Complaint

2. Ocean Power alleges that, because no Jersey Central local distribution facilities were used for the deliveries of station power, Jersey Central has no legal right to charge Ocean Power distribution charges. Ocean Power seeks a refund, with interest, of \$469,041, which represents the total of such charges from April 2003 to June 2005 (the refund period) except for two months in which, Ocean Power states, it purchased station power at retail from Jersey Central and had such energy delivered to its generator, albeit

¹ The Commission accepted for filing, as modified, PJM's station power provisions in a series of orders issued in 2001. *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251 (*PJM II*), *order denying reh'g and providing clarification*, 95 FERC ¶ 61,333 (*PJM III*), *order on rate change application*, 95 FERC ¶ 61,470 (2001) (*PJM IV*).

over only PJM-controlled transmission facilities.² Ocean Power also requests that the Commission direct Jersey Central to cease violating Attachment K of the PJM OATT by interfering with Ocean Power's utilization of PJM's station power provisions and refrain in the future from assessing Ocean Power local distribution charges under Jersey Central's retail tariff.

3. Ocean Power owns and operates a 330 MW natural gas-fired generator located in Lakewood, New Jersey (the Facility), which is within Jersey Central's service territory and within the Jersey Central zone of PJM.³ Ocean Power states that the Facility's interconnection facilities consist of two generation breakers and two generator step-up transformers located in the Ocean Power 230 kV switchyard and interconnected to Jersey Central's 230 kV Lakewood Substation. Ocean Power explains that the two generator step-up transformers raise voltage from 18 kV to 230 kV, which is the transmission line voltage on site. Through the Lakewood Substation, Ocean Power states, the Facility is directly interconnected to four Jersey Central 230 kV transmission lines. According to Ocean Power, the four 230 kV transmission lines and the Lakewood Substation are under the operational control of PJM, are listed by PJM on PJM's website as First Energy – Jersey Central integrated transmission facilities, and Jersey Central is compensated for the use of these transmission facilities under the PJM OATT.

4. Ocean Power contends that the interconnection facilities do not include any Jersey Central local distribution facilities, and claims that, during its negotiations with Jersey Central over this dispute, Jersey Central representatives could not identify any local distribution facilities used to deliver station power to the Facility. Therefore, Ocean Power concludes, any station power that is delivered to the Facility, when the Facility is not self-supplying on site, is delivered directly to the interconnection point between the Facility and Jersey Central's transmission lines (and thus over transmission facilities owned by Jersey Central, but operated by PJM) without ever being delivered across Jersey Central's local distribution facilities.

² While Ocean Power is not contesting Jersey Central's charges for these two months (November 2003 and February 2004), it nonetheless maintains that no Jersey Central local distribution facilities were used to deliver station power to it in those months.

³ Ocean Power is authorized by the Commission to sell power and energy at market-based rates. *Ocean Peaking Power, L.P.*, Docket No. ER02-2080-000 (July 12, 2002) (unpublished letter order); *see generally Ocean Peaking Power, L.P.*, 100 FERC ¶ 62,043 (2002).

5. Ocean Power states that it does not own any other generating facilities and thus cannot remotely self-supply; it must procure its station power through either on-site self-supply or third-party purchases. In the past, with the exception of two months in which it purchased station power at retail from Jersey Central, Ocean Power declares, it has self-supplied its station power requirements on site in accordance with Attachment K of the PJM OATT. In the future, to the extent that it cannot self-supply its full station power requirements on site, Ocean Power says that it intends to purchase station power from suppliers (other than Jersey Central) that are licensed to sell power to customers in Jersey Central's service territory under New Jersey's customer-choice, retail unbundling program. If and when it makes such third-party purchases, Ocean Power explains, it would pay the third-party supplier directly for the energy and also pay, under the PJM OATT, for transmission of the energy to the interconnection point between the Facility and the PJM transmission system (and thus over transmission facilities owned by Jersey Central, but operated by PJM).

6. Ocean Power cites to the Commission's station power precedent as support for its claim that Jersey Central cannot assess its local distribution charges when it is self-supplying on site or when it is purchasing station power from third-parties given that, in either scenario, it is not using Jersey Central-owned local distribution facilities for such self-supply or purchases. In particular, Ocean Power cites to the *AES Warrior Run*⁴ proceeding which, it claims, involved an almost identical set of circumstances. Ocean Power notes that, in its remand order in *AES Warrior Run*,⁵ the Commission determined that it had authority to order a refund of monies collected pursuant to a state tariff for delivery of station power when no local distribution facilities were, in fact, used to deliver the station power, but only transmission facilities. Ocean Power requests that the Commission similarly exercise its authority here and direct Jersey Central to refund the charges collected under its state tariff for deliveries of station power that were made solely over transmission facilities. It is Ocean Power's contention that, as was the case in *AES Warrior Run*, any charges that Jersey Central assesses under its state tariff for local distribution service are an impermissible double charge for transmission service.

⁴ *AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051, *reh'g denied*, 105 FERC ¶ 61,357 (2003), *order on remand*, 108 FERC ¶ 61,316 (2004), *order on reh'g and rejecting refund report*, 112 FERC ¶ 61,020 (2005) (*AES Warrior Run*).

⁵ Ocean Power cites to *AES Warrior Run*, 108 FERC ¶ 61,316 at P 13, and to a case cited therein, *Public Utilities Comm'n of California v. FERC*, 143 F.3d, 610, 617-18 (D.C. Cir. 1998).

7. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 49,917 (2005), with the answer, protests and interventions due on or before September 6, 2005. Jersey Central filed an answer on September 6, 2005. No interventions or comments were filed. On September 21, 2005, Ocean Power filed a motion to reply and reply to Jersey Central's answer, and on September 30, 2005, Jersey Central filed a response.

Answer

8. In its answer, Jersey Central contests Ocean Power's allegation that none of its local distribution facilities are used to deliver station power to the Facility. According to Jersey Central, it has categorized a number of the facilities used to provide station power to the Facility as local distribution facilities in its Form No. 1 accounts. These facilities include, "at a minimum, five meters and a separate distribution circuit comprising a cable, transformer, and meter."⁶ Jersey Central states that the cable carries station power into the Facility, and the transformer "steps down power carried over the primary cable."⁷ Further, Jersey Central asserts that each of the facilities satisfies the Commission's seven-factor test for identifying distribution facilities first enumerated in Order No. 888.⁸

9. Even if the facilities issue were resolved in Ocean Power's favor, Jersey Central asserts that Ocean Power does not understand the rules applicable to generators that are not self-supplying station power. Jersey Central cites *Midwest Independent Transmission System Operator, Inc.*,⁹ to support its position that Ocean Power must pay state-jurisdictional charges when it cannot self-supply, and asserts that Ocean Power's rejection of the retail tariff in months where it purchases station power from third parties is contrary to Commission precedent.

⁶ Answer at 7.

⁷ *Id.* at 8.

⁸ See *Promoting Wholesale Competition Through Open Access Non discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 at 31,980-81 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁹ 112 FERC ¶ 61,211 at P 17-18 (2005) ("... to the extent that a self-supplying generator has a negative net output during a netting period, and a third party sale has in fact occurred, state law and the relevant retail tariff would apply . . .").

10. According to Jersey Central, the Commission and the courts have confirmed that states have jurisdiction over the local delivery of power to end-users. Jersey Central cites Order No. 888¹⁰ and *Detroit Edison*¹¹ to support its contention that states have jurisdiction over the service of local delivery of power regardless of the type of facilities used to provide that service.

11. Jersey Central states that exclusive federal jurisdiction over the delivery of station power would preempt state authority, and argues that the Supreme Court has applied a presumption that traditional state powers are not to be preempted by federal action absent the clear intent of Congress. Thus, Jersey Central concludes that “any Commission attempt to eliminate state regulation of such delivery would run afoul of the presumption against pre-emption.”¹²

12. Further, Jersey Central urges that there are strong policy reasons for recognizing state jurisdiction over local delivery service, including: the ability to pass on to Ocean Power its share of the stranded costs and benefits charges that the New Jersey Board of Public Utilities (New Jersey Board) has prescribed for end users, particularly since Ocean Power and other independent power producers are among the primary beneficiaries of the restructuring that led to the stranded costs; and the lack of state jurisdiction would allow bypass of stranded costs and benefits charges for all large industrial and commercial customers, giving such customers an incentive to modify their electrical connections to exploit the loophole.

13. Finally, Jersey Central challenges the Commission’s imposition of monthly netting as arbitrary and capricious, charging that there is “no justification for a 30-day ‘netting’ fiction that has the effect of erasing delivery of station power that has concededly occurred, enabling the generating station to obtain the service at no cost.”¹³ Jersey Central also objects to the application of monthly netting for unbundled retail transmission to end users when hourly netting is used for determining locational marginal pricing (LMP).

¹⁰ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,783.

¹¹ *Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003).

¹² Answer at 20.

¹³ *Id.* at 23.

Discussion

Procedural Matters

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Ocean Power's reply and Jersey Central's subsequent response, and will, therefore, reject them.

Hearing and Settlement Judge Procedures

15. Ocean Power's complaint raises issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. Specifically, the hearing should address whether any Jersey Central local distribution facilities are used to deliver station power to Ocean Power's Facility.¹⁴

16. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁵ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁶ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief

¹⁴ We remind the parties of the conclusion we reached in *Entergy Nuclear Operations, Inc. v. Consolidated Edison Company of New York, Inc.*, 112 FERC ¶ 61,117 at P 40 (2005) (*Entergy Nuclear*), that the seven factor test described in Order No. 888 does not apply in the case of facilities delivering station power to generating stations. We explained that such facilities were never involved in the provision of bundled retail service to end users, requiring a classification as transmission or local distribution by a state commission.

¹⁵ 18 C.F.R. § 385.603 (2005).

¹⁶ If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

17. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), as recently amended by section 1285 of the Energy Policy Act of 2005,¹⁷ requires that the Commission establish a refund effective date that is no earlier than the date of the filing of the complaint, but no later than five months subsequent to that date. Consistent with our general policy,¹⁸ we will set the refund effective date as the date of the filing of this complaint, *i.e.*, August 16, 2005.¹⁹

18. Section 206(b), as amended, also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision.

19. Based on our review of the record, we expect that the presiding judge would be able to issue an initial decision within approximately eight months of the commencement of hearing procedures, or, if hearing procedures were to commence immediately, by June 30, 2006. If the presiding judge is able to render a decision within that time, and assuming the case does not settle, we estimate that we will be able to issue our decision within approximately three months of the filing of briefs on and opposing exceptions, or, assuming the case goes to hearing immediately, by December 29, 2006.

Other Matters

20. Jersey Central contends that state jurisdiction over the local delivery of power applies in the context of the delivery of station power to generators, asserting that Commission precedent recognizes such jurisdiction. Jersey Central also challenges the Commission's authority to impose monthly netting. We have rejected these arguments in

¹⁷ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

¹⁸ See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

¹⁹ *AES Warrior Run*, 108 FERC ¶ 61,316 (holding that the Commission has the authority to order refunds of monies improperly collected pursuant to a state tariff when the service being provided was subject to federal regulation); *DTE Energy Trading, Inc. v. Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,062 at P 28 (2005) (explaining that the Commission may order refunds for past periods when a public utility has misapplied a formula rate or has charged rates contrary to the filed rate).

earlier station power orders.²⁰ As we have stated before, we are not departing from our rationale in Order No. 888 by allowing merchant generators to self-supply station power via netting under a Commission-jurisdictional tariff. Nor are we prohibiting a utility from collecting charges for stranded costs and benefits through retail, local distribution rates for providing a service over local distribution facilities. Further, the jurisdictional issue in *Detroit Edison* is distinguishable.²¹

21. In *KeySpan IV*, we explained why netting station power over a reasonable period of time does not entail retail sales of electricity, concluding that “[s]imply because there may be momentary instances during the netting interval when a particular generating facility’s output is negative does not mean that the facility’s owner is buying station power at retail.”²² In making this argument, Jersey Central also engages in an impermissible collateral attack on findings that the Commission made in the order accepting for filing PJM’s tariff revisions authorizing the netting of station power used at generating stations against certain wholesale sales.²³ We also have explained previously why the application of congestion management pricing (as reflected by locational marginal prices) to the withdrawals and injections of energy, including station power remotely self-supplied, is not a retail sale of energy.²⁴

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission’s Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning whether Jersey Central local distribution facilities are used to

²⁰ See, e.g., *PJM II*, 94 FERC at 61,889-91; *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2003), *reh’g denied*, 107 FERC ¶ 61,142 (*KeySpan IV*), *clarified*, 108 FERC ¶ 61,164 (2004), *petition for review filed sub nom. Niagara Mohawk Power Corp. v. FERC*, Nos. 04-227, *et al.* (D.C. Cir. Filed July 8, 2004).

²¹ See *Entergy Nuclear*, 112 FERC ¶ 61,117 at P 30.

²² *KeySpan IV*, 107 FERC ¶ 61,142 at P 40.

²³ See *PJM II*, 94 FERC ¶ 61,251 at 61,892-93; *PJM III*, 95 FERC ¶ 61,333 at 62,185-86.

²⁴ *Id.* at P 29-36; see also *New York Power Authority v. Consolidated Edison Company of New York, Inc.*, 112 FERC ¶ 61,304 at P 50 & n.17 (2005).

deliver station power to Ocean Power's Facility. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) The refund effective date established pursuant to section 206(b) of the Federal Power Act is August 16, 2005.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.